IN THE

Supreme Court of the United States

No. 173

UNITED STATES AND INTERSTATE COMMERCE COMMISSION,

Appellants,

v.

UNITED STATES SMELTING, REFINING & MINING COMPANY, DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, AND UNION PACIFIC RAILROAD COMPANY,

Appellees,

and

UNITED STATES AND INTERSTATE COMMERCE COMMISSION,

Appellants,

v.

DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, UNION PACIFIC RAILROAD COMPANY, AND AMERICAN SMELTING AND REFINING COMPANY,

Appellees.

CONSOLIDATED CAUSES

BRIEF FOR APPELLEE THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

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February 1, 1950.

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BRIEF FOR APPELLEE THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

In addition to the reasons for sustaining the Statutory Court stated in joint briefs by the Appellees, the Denver and Rio Grande Western Railroad (hereinafter called Rio Grande) has the following particular answers to this Appeal.

I. THE INTERSTATE COMMERCE COMMISSION HAS BEEN ARBITRARY AND UNREASONABLE IN

IGNORING THE ECONOMIC SITUATION OF THE MINING INDUSTRY AS IT AFFECTS THE TRAFFIC AND REVENUE OF THE RIO GRANDE.

II. THE INTERSTATE COMMERCE COMMISSION HAS BEEN ARBITRARY AND UNREASONABLE IN IGNORING THE PRACTICAL RESULTS THAT WOULD BE EFFECTED BY THE ENJOINED ORDER.

III. THE COMMISSION'S INVESTIGATION, CONTRARY TO DECISION OF THIS COURT, HAS BEEN PERFUNCTORY AND SUPERFICIAL.

IV. THE EVIDENCE BEFORE THE COMMISSION DOES NOT SUPPORT FINDINGS THAT THE "PLANT YARD" AT GARFIELD AND THE "FLAT YARD" AT LEADVILLE ARE REASONABLY CONVENIENT POINTS FOR THE DELIVERY AND RECEIPT OF CARLOAD TRAFFIC MOVING TO AND FROM THESE PLANTS.

I

THE INTERSTATE COMMERCE COMMISSION HAS BEEN ARBITRARY AND UNREASONABLE IN IGNORING THE ECONOMIC SITUATION OF THE MINING INDUSTRY AS IT AFFECTS THE TRAFFIC AND REVENUE OF THE RIO GRANDE.

The Rio Grande was primarily constructed to serve the mining districts in Colorado and Utah. In 1922, 75% of its traffic came from the mining industry, and in 1940, 51% of its traffic came from the mining industry. (R. 1098)

An important part of this mining industry is that of metal mining in Colorado and Utah, which industry contributes heavily to Rio Grande traffic, and is an industry that is considered to be marginal. Its marginal character has been recognized in various rates cases by the Commission (see "Increases Intrastate Rates — 186 I.C.C. 615"), and it has been recognized by Congress in the subsidies granted the non-ferrous miners during the war period. (R. 1099)

Of all those engaged in this marginal industry it is the miner that will pay the duplicate switching charge that the Commission established in its enjoined order. Such charges along with other expenses are deducted from the value of the metal in the car of ore shipped to the smelter, and the value of the metal is determined by an international market over which the miner has no control. He can not pass on to the consumer this additional expense as is true of other industries considered by this Court in these Ex Parte 104 investigations.

Therefore, the payment of this duplicate charge would be an additional burden on the miner of non-ferrous ores and one of the results would be an undeterminable loss of mine and smelter traffic to the Rio Grande. (R. 1099)

The Commission has ignored this evidence and the Examiner for the Commission termed it immaterial. (R. 1099) This is directly contrary to the purpose of the Commission in instituting the Ex Parte 104 investigation and is an arbitrary and unreasonable exercise of its authority.

II

THE INTERSTATE COMMERCE COMMISSION HAS BEEN ARBITRARY AND UNREASONABLE IN IGNORING THE PRACTICAL RESULT THAT WOULD BE EFFECTED BY THE ENJOINED ORDER.

It has been the continuing purpose of the Rio Grande to develop mine traffic and because of the necessity of moving low grade ore and concentrates as well as high grade ore and concentrates to the smelter, a system of rates has been developed that is based on graded valuation. (R. 914) Such a system enables the shipper in this marginal industry to move at a reasonable freight rate to the smelter low grade ore that must be mined before he can block out the more profitable high grade ore.

Were rates based on declared values, shippers naturally would take advantage of the lowest declared value, to the detriment of the railroad company. If rates on a graded valuation basis were eliminated, and the railroad made a

flat rate, regardless of value, that rate necessarily would be of such volume as to eliminate the movement of low grade ore, and retard development of the industry.

A duplicate switch charge as ordered by the Commission would apply to all cars of ore, low grade and high grade alike, and concentrates, and would partially nullify the beneficial results of line haul rates based on actual graded valuations.

Thus the benefits of this practical and simple method developed by the railroads over many years of basing all charges for services to the shipper on the actual graded valuations would be removed by this enjoined order. This was also the conclusion of the Commission on the basis of similar facts in Arlington Silver Mining Co. v. Great Northern Ry. Co., 83 I.C.C. 255.

III

THE INTERSTATE COMMERCE COMMISSION INVESTIGATION, CONTRARY TO DECISION OF THIS COURT, HAS BEEN PERFUNCTORY AND SUPERFICIAL.

In the basic report (209 I.C.C. 11) the Commission established a formula for testing the responsibility of the carrier. This Court has approved of that formula, but in the "Staley" case (U.S. v. Wabash R.R. Co., 321 U.S. 407), advised the Commission as follows:

> "The application of such a test obviously requires an intensive study of traffic conditions prevailing at the particular plant at which the spotting service is rendered."

No such intensive study was made by the Commission at any of these plants as is proved by admissions of the investigators for the Commission. The testimony and admissions made by these witnesses are outlined briefly as follows:

William O. McCormick (R. 918-923) introduced an exhibit in evidence consisting of 15 pages (R. 1178) which is a record of car numbers and the movement of such cars

by engine 1024 at Garfield, Utah, covering an eight-hour shift each day for a four-day period. Upon cross-examination, Mr. McCormick admitted that he kept no record of intra-plant moves for which the smelter pays a charge, nor moves made for the convenience of the carrier. He admitted that no record was kept of the commodities in these cars. He could only testify as to the numbers of the cars and the movements of each car.

C. B. Higgins (R. 923-926) introduced an exhibit in evidence of 17 pages (R. 1194) which is a record of car numbers and the movement of such cars by engine 1016 at Garfield, Utah, covering an eight hour shift each day for a four-day period. He admitted that he would make the same answers as Mr. McCormick did to the questions put to Mr. McCormick on cross-examination. He kept only a record of the physical movement of the cars.

F. C. MacDonald (R. 926-944) introduced an exhibit in evidence of 15 pages (R. 1214) prepared by Gordon Morris. This was a record of car numbers and the movements of such cars by engine 1024 at Garfield, Utah. It was admitted that Mr. Morris kept no record of the purpose of the various movements and had no knowledge of the commodities carried.

F. C. MacDonald (R. 926-944) who had supervised the investigation also introduced in evidence an exhibit of 28 pages (R. 1229) which was a statement compiled from the three preceding exhibits and covered movements from those exhibits chosen by Mr. MacDonald.

Mr. MacDonald on cross-examination stated that the "plant yard" at Garfield, Utah, was a railroad interchange yard (R. 928). He stated that he did not know why the various car movements were made and that he had no knowledge of the relationship between the movement of one c and other cars in the same train.

It is upon such a superficial investigation that the order of the Commission is founded. It is not an intensive study

of traffic conditions prevailing at the smelter plant at Garfield, Utah, as is required, according to the decision of this Court. A similar though less extensive investigation was made at the plant at Leadville, Colorado.

IV

THE EVIDENCE BEFORE THE COMMISSION DOES NOT SUPPORT FINDINGS THAT THE "PLANT YARD" AT GARFIELD AND THE "FLAT YARD" AT LEADVILLE ARE REASONABLY CONVENIENT POINTS FOR THE DELIVERY AND RECEIPT OF CARLOAD TRAFFIC MOVING TO AND FROM THESE PLANTS.

As has been previously stated, the evidence of the witnesses for the Commission was confined to a superficial record of car numbers and car movements. None of the witnesses were able to tell why the car movements were made, none of them could testify as to the commodities carried. The supervisor of the investigation also did not know why such movements were made, and in addition had no knowledge of the relationship between cars in the various trains.

This fundamental information is needed to distinguish those movements which are intraplant from those movements which are a part of the line haul, and to separate all of these movements from those made for the convenience of the railroad.

In addition to a lack of the required intensive study of traffic conditions, the testimony of Mr. MacDonald, the supervisor of the investigation, is diametrically opposed to the findings of the Commission when he terms the "plant yard" at Garfield a railroad interchange yard, and states that the switch movements in the yard are orderly and that the intraplant moves which he had noticed did not interrupt interstate traffic.

This evidence is supported by the testimony of K. L. Moriarty, the operating witness for the Rio Grande. (R 877-908). He stated that three railroads deliver trains to the

"plant yard"; that these trains are classified and delivered in a straight movement and with few exceptions to unloading bins or docks and other points inside the plant (R. 893); that the principal use of the plant yard at Garfield is for the delivery of road haul trains and for the classification of those trains. (R. 898)

He further stated that the orders for delivery of cars made by the smelter employees were only given after the trains had been classified, the cars weighed and placed on hold tracks. He stated that this is true of any railroad yard handling trains for any industry and that this "plant yard" is the only facility available for such terminal work by the carriers. (R. 899-900)

Similar testimony by Mr. Moriarty developed the facts that trains are made up in the "plant yard" for outbound movements and that switching at Garfield is just like industrial switching at any large city where it is necessary to classify a train prior to the arrival of the spotting engine. He stated that the operation was efficient and compares favorably with the switching at the Salt Lake terminal. (R. 901-903)

With respect to the operation at Leadville Mr. Moriarty testified (R. 1081-1095) that the "flat yard" is used by the railroad as a terminal yard for the benefit of several shippers. These included truckers that bring in ore of independent shippers for outbound movement by rail, the Ore & Chemical Company, the Resurrection Company and the American Smelting and Refining Company.

Contrary to this evidence of Mr. Moriarty and without supporting evidence by its own investigators, the Commission found that the "plant yard" and the "flat yard" are reasonably convenient points for the delivery and receipt of carload traffic in these plants.

Thus, by the record, the only evidence before the Commission is to the effect that the "plant yard" at Garfield and the "flat yard" at Leadville are railroad terminal yards. This was the evidence of an experienced railroad operating official who testified in detail with regard to these operations. His qualifications were not objected to by the Commission. His testimony was accepted by the Commission. It stands in the record unrefuted, and is in direct contradiction to the Commission's findings and this was so held by the Statutory Court.

CONCLUSION

For the reasons stated, the decree of the Statutory Court should be affirmed.

Respectfully submitted,

OTIS J. GIBSON.